IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON PLAINTIFF

V. CIVIL ACTION NO.: 2:07CV42 WAP-EMB

ONE AMERICA PRODUCTIONS, INC.,
EVERYMAN PICTURES, TWENTIETH
CENTURY FOX FILM CORPORATION
and JOHN DOES 1 AND 2 DEFENDANTS

DEFENDANTS' REBUTTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO ALTER OR AMEND THE DISTRICT COURT'S ORDER DATED AUGUST 22, 2007 OR, IN THE ALTERNATIVE, TO CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND ENTRY OF A STAY

Plaintiff's Response concedes so much, expressly and tacitly, that Defendants' Motion must be granted. Plaintiff expressly states that her “gross negligence” allegation is a claim for punitive damages rather than a substantive claim of liability. Plaintiff also unwittingly admits that her false light claim is in fatal conflict with an indisputable fact that this Court has already recognized: that "[t]he viewer of the film is aware that although the character Borat and his producer are actors, almost everyone they meet are not actors and are unaware that Borat is a fictional character.” Memorandum Opinion 2. Finally, as to her misappropriation claim, Plaintiff is largely silent on the points raised in Defendants’ original Motion; where she is not silent, Plaintiff is clearly and plainly wrong.

The “gross negligence” claim. In their moving papers, Defendants point out that the Complaint’s allegation of “gross negligence,” see Plaintiff's Complaint ¶ 7 (March 19, 2007), “is there solely as the basis for Plaintiff’s alleged entitlement to punitive damages – not as an independent substantive claim.” See Memo In Support Of Defendants’ Motion To Alter Or

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Amend 5 (Sept. 5, 2007), Docket 22. Defendants also observe that Mississippi law does not recognize "claims for negligence based on a publication that is entitled to the full protection of the First Amendment", such as Defendants' film, and that the First Amendment does not allow such claims absent an allegation that "the published work contains statements about the plaintiff that are false or that are made with a reckless disregard as to their truth or falsity" and that the film makes no false statements about Plaintiff, a point that Plaintiff has previously conceded. *Id.* 6-7.

In her Response, Plaintiff admits her "gross negligence" allegation is "a claim . . . for punitive damages" rather than a substantive claim. See Plaintiff's Response to Defendants' Motion To Alter Or Amend. 1 (Sept. 18, 2007)("Plaintiff's Response'), Docket 24. Under Mississippi law, it is well-established that "a claim for punitive damages is not 'free-standing'' and depends upon the existence of an underlying substantive claim. *Temple-Inland Mortg. Corp. v. Jones,* 749 So. 2d 1161, 1169 (Miss. App. 1999), *quoting Kaplan v. Harco Nat'l Ins. Co.,* 716 So. 2d 673, 680 (Miss. App. 1998); *see* Miss. Code § 11-1-65(c) (Supp. 2003).[1] Further, Plaintiff does not dispute that Mississippi law does not recognize claims for negligence based on a publication that is entitled to the full protection of the First Amendment such as Defendants' motion picture film. In summary, Plaintiff concedes that the Complaint's reference to "gross negligence" is not a substantive claim of liability – but rather one for punitive damages, which is dependent upon her alleged invasion of privacy claims. Accordingly, the District Court should amend its Order, dated August 22, 2007, to

[1] Miss. Code § 11-1-65(c) (Supp. 2003) provides: "If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered."

reflect that which is undisputed: Plaintiff's "gross negligence" allegation is a claim for punitive damages rather than a substantive claim for liability.

The false light claim. In their moving papers, Defendants gave a detailed analysis of why the District Court's discussion of Plaintiff's false light claim was a clear error of law: it failed to follow the approach utilized in every other federal and state false light decision decided under Mississippi law; it improperly merged two distinct elements of a false light claim into one; it used a subjective standard focusing on Plaintiff's own perception of the film rather than an objective standard focusing on the audience's likely perception for determining whether the portrayal of a false light claimant is actionable; and that the District Court's own description of the film shows that Plaintiff's argument of how she (and, by necessary extension, the group of worshipers as a whole) is portrayed in the film is unreasonable as a matter of law. See Memo In Support Of Defendants' Motion To Alter Or Amend 7-10 (Sept. 5, 2007), Docket 22. Plaintiff fails to come to grips with any of these points.

First, Plaintiff contends, incorrectly, that Defendants argue "repeatedly, that the Plaintiff, in essence, consented to her portrayal . . . ." See Plaintiff's Response 3, Docket 24. This is an attempt at misdirection. Defendants have never made this argument: the word "consent" does not even appear in their pending Motion. As Defendants previously noted, "[l]ack of consent is not an element of Johnston's privacy claims, and Defendants do not raise consent as a defense in their Motion To Dismiss." See Rebuttal Memorandum In Support Of Defendants' Motion To Dismiss 1-2 (July 24, 2007), Docket 12.

Plaintiff then appears to re-cast the District Court's ruling on her false light claim as an objective rather than a subjective standard, while nonetheless still adding Plaintiff's perception of the movie as an element of the claim:

> Defendants must concede what the Plaintiff argues: that *reasonable persons viewing the film in question could reasonably conclude* that the plaintiff was either a willing participant in a parody of her religious beliefs or voluntarily consented to the depiction in question, making her a willing participant to such a parody after the fact.

(Emphasis added.) Plaintiff's Response 3. Not only do Defendants **not** concede this point, as reflected throughout their Motion papers, but the Court's own order recognizes that, objectively viewed, the movie is not reasonably subject to this interpretation.

The Memorandum Opinion concluded there were jury questions of "(1) whether … a person in the plaintiff's position would believe others would believe she willingly participated in a mocking of her religion . . . ." Memorandum Opinion 10. Defendant's Motion to Reconsider showed that this formulation of the issue is incorrect because (1) Plaintiff's perception of the film, while perhaps relevant to her feelings, was irrelevant to the liability issue and (2) the Court made the added element depend on Plaintiff's **subjective** belief. If this were the law, the courts would be flooded with litigation by plaintiffs who claimed "to believe others would believe" that the defendant had published some statement that put the plaintiff in a false light. Fortunately, this is not the law of Mississippi or the position of the Restatement (Second) of Torts relied on by the Court. Plaintiff's Response at 4 reassures the Court that Plaintiff's belief would have to be "reasonable" and thus an "objective standard." But that addresses only half the problem of making liability depend on a plaintiff's subjective belief.

As the Restatement and this Court acknowledges, establishing the false light tort depends upon showing that the subject publication can reasonably be said to carry the gist of the message claimed by Plaintiff, namely, that the movie made it appear that she and, by necessity, all of her fellow worshipers willingly participated in a segment that mocked their religious beliefs, knowing it to be a mockery. If, as the Court noted twice in its Memorandum Opinion at pages at 2 and 14, no reasonable audience or observer could understand the movie (which supersedes the allegations of the Complaint in these circumstances) to make that charge about the religious celebrants in the crowd scenes of church camp episode, including the only crowd shot where Plaintiff briefly appears, it does not matter one whit what Plaintiff claims she "believes" about the gist of the movie.

Thus, if Plaintiff truly believes that the false light standard requires a determination of what a *reasonable person* would conclude from watching the film, as the law clearly dictates, then her false light claim must be dismissed as a matter of law because Plaintiff's argument of how she is portrayed in a false light is contrary to and totally inconsistent with this Court's very own description of what the viewer knows while watching the film. See Memorandum Opinion 2 & 14 (at page 2 - "[t]he viewer of the film is aware that although the character Borat and his producer are actors, almost everyone they meet are not actors and are unaware that Borat is a fictional character, believing he is in fact from Kazakhstan filming a documentary on American culture;" at page 14 - "the viewer [of Borat] is also aware that the vast majority, if not all, of the other people featured in the movie are non-public figures who are not actors and are likely unaware that Borat is not a . . . reporter filming a documentary").

Further, even if Plaintiff later, and inconsistently, embraces the Memorandum Opinion's subjective standard, see Memorandum Opinion 9-10, her false light claim must be still be dismissed even under that erroneous standard for the same reason: that is, her argument as to how she feels the film might be interpreted to depict her in a crowd scene of fellow believers is unreasonable as a matter of law since the "viewer of the film is aware that although the character Borat and his producer are actors, almost everyone they meet are not actors and are unaware that Borat is a fictional character . . . ." See Memorandum Opinion 2. No reasonable viewer upon watching the crowd scene of which Plaintiff is a part could look at this group of worshipers and reasonably believe that Plaintiff or the group of which she is a member is mocking or parodying their religion.

For this reason, in the light of the rules of interpretation that must be strictly applied to her claim under Mississippi law, see Memo In Support Of Defendants' Motion To Alter Or Amend 9, her argument fails as a matter of law. Regardless what Plaintiff "believes others would believe," see Plaintiff's Response 4, a reasonable person viewing the scene in context could not, as a matter of law, conclude that Plaintiff was doing anything other than what the film depicts – participating as one member of a large group of fellow believers who are sincerely rejoicing in what they believe is a genuine religious conversion or experience. The film makes no false depiction of Plaintiff, her image or her likeness,[2] and it does not place her as a member of this group in a false light under any objective standard.

[2] Plaintiff incorrectly states that "[i]n a claim for false light invasion of privacy, . . . a claim is recognized where the underlying publication is true and factual, but the manner of its publication casts the plaintiff in a false light that is susceptible of jury determination as being highly offensive to one in the position of the plaintiff." See Plaintiff's Response 2. This is **not** the law of Mississippi, and it is directly contrary to and refuted by *Prescott v. Bay St. Louis Newspaper, Inc.,* 497 So. 2d 77, 79 (Miss. 1986) ("[It is] essential . . . that 'the matter published concerning the plaintiff is not true.'"), *quoting* Restatement (Second) of Torts § 652E comment *a*, at p. 395 (1977).

The misappropriation claim. In their moving papers, Defendants argued that the District Court committed manifest clear error in three fundamental ways: by erroneously equating the motion picture film, a commercial *enterprise*, with commercial *speech*; by failing to apply the same analysis and protections to this motion picture film as applied by the courts in *Matthews v. Wozencraft,* 15 F.3d 432, 440 (5th Cir. 1994), and *Tyne v. Time Warner Entertainment Co.,* 901 So. 2d 802, 808-09 (Fla. 2005), to misappropriation claims indistinguishable from Plaintiff's claim; and by failing to recognize that the First Amendment creates a privilege that allows the incidental publication of her image or likeness in this public church camp meeting. See Memo In Support Of Defendants' Motion To Alter Or Amend 11-15 (Sept. 5, 2007).

Once again Plaintiff simply ignores these arguments and fails to address any of them on their merits except again inexplicably continuing to argue that the motion picture film is "purely commercial", thereby impliedly arguing that Plaintiff may subject Defendants to the expense and uncertainty of litigation, and perhaps even a judgment, without regard for the First Amendment. See Plaintiff's Response 5. As Defendants stated in their moving papers, they "have found no reported decision that holds that a motion picture film such as *Borat* is commercial speech or that the incidental use of a person's image in this context is actionable. . . . [A]ll published authority is to the contrary." See Memo In Support Of Defendants' Motion To Alter Or Amend 15 (Sept. 5, 2007). Plaintiff's reference to "Candid Camera" and her *ipse dixit* pronouncement about the "purely commercial" nature of the work provide no proper support for the District Court's manifest clear error in upholding Plaintiff's misappropriation claim.

Finally, Plaintiff argues that the "value inherent" in the use of her image is that she is not a hired actor but the "genuine article," see Plaintiff's Response 5, a claim entirely inconsistent with her false light claim that viewers will believe she is a willing participant in the film. But Plaintiff makes no effort to explain how the use of this public crowd scene is not fully protected by the First Amendment or an incidental use of her image which is just as clearly not actionable. Her response is nothing more than a legally unsupported (and unsupportable) jury argument to the contrary.

The Motion To Certify and To Stay. Not surprisingly, Plaintiff opposes Defendants' Motion to Certify the District Court's Decision for Interlocutory Appeal and To Stay the Proceedings. Yet Plaintiff offers no reason why this case in its current posture is not an ideal candidate for certification. Clearly all the issues are controlling questions of law, and if all are resolved in Defendants' favor, the case will be concluded. Even if only some of them are resolved in Defendants' favor, this will greatly simplify further proceedings in the District Court.

CONCLUSION

Defendants One America Productions, Inc., and Twentieth Century Fox Film Corporation respectfully request that their Motion to Alter or Amend the August 22, 2007 Order be granted; that the Complaint be dismissed with prejudice and costs assessed to Plaintiff; in the alternative only, that the Court certify the Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stay the case pending the Fifth Circuit's consideration of Defendants' Application for Leave to Appeal; and that Defendants be granted any other general or special relief as may be appropriate.

THIS, the 24th day of September, 2007.

Respectfully submitted,

ONE AMERICA PRODUCTIONS, INC.,
AND TWENTIETH CENTURY FOX FILM CORPORATION

s/ John C. Henegan
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CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, hereby certify that I have this day filed the above and foregoing DEFENDANTS' REBUTTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO ALTER OR AMEND THE DISTRICT COURT'S ORDER DATED AUGUST 22, 2007 OR IN THE ALTERNATIVE, TO CERTIFY THE ORDER FOR INTERLOCUTORY APPEAL UNDER § 28 U.S.C. 1292(b) AND ENTRY OF A STAY with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
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ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 24th day of September, 2007.

s/ John C. Henegan
JOHN C. HENEGAN

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